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Supreme Court of the United States

October Term, 1956.

No. 839.

DANIEL DUGAN, a Minor, By His Parents and Natural Guardians, DANIEL DUGAN and HELEN DUGAN, His Wife; and DANIEL DUGAN and HELEN DUGAN, His Wife, in Their Own Rights,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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DANIEL DUGAN, A MINOR, BY HIS PARENTS AND NATURAL GUARDIANS, DANIEL DUGAN AND HELEN DUGAN, HIS WIFE; AND DANIEL DUGAN AND HELEN DUGAN, HIS WIFE, IN THEIR OWN RIGHTS,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported at 387 Pa. 25 (1956). The opinion of the Court of Common Pleas is unreported but appears in the record at p. 272a.[1]

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. § 1257(3) upon a petition for a writ of certiorari to the Supreme Court of Pennsylvania, but the question raised by the petition was not presented to the court below and there is no substantial federal question involved.

1. All references to exhibits and page references followed by the letter "a" are to pages of the Record on appeal to the Pennsylvania Supreme Court, unless otherwise indicated.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a question which was not presented in the state court below should be considered upon petition for certiorari, where the first time a federal question was raised was in a petition for reargument, filed after the court's adverse decision upon grounds which could have been anticipated.

2. Whether a judgment of the highest appellate court of a state involving solely a question of state negligence law, decided in accordance with earlier decisions of that court in similar cases, merits review upon petition for certiorari.

STATEMENT OF THE CASE.[2]

Petitioners brought suit in the Court of Common Pleas of Philadelphia County for injuries sustained by the minor petitioner from an overhead power line when he climbed to the top of a freight car, which was part of a 61 car train stopped temporarily in transit, on the second of four main line tracks of The Pennsylvania Railroad Company in the vicinity of the bridge carrying 67th Street across the tracks in Philadelphia. The jury returned verdicts in favor of petitioners, and respondent's motion for judgment notwithstanding the verdict was denied by the trial court. Respondent appealed from the denial of this motion to the Supreme Court of Pennsylvania. That court, acting under the Act of May 20, 1891, P. L. 101 § 2, 12 P. S. 1164, reversed the judgment in favor of petitioners and entered judgment in favor of respondent.

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2. Since some of the misstatements of fact and unwarranted assumptions which caused difficulty to the Supreme Court of Pennsylvania (see footnote 4 of the opinion of the Supreme Court of Pennsylvania, Petitioners' Appendix, 17a) appear also in petitioners' Statement of the Case (Petition, pp. 3-10), respondent has prepared an appendix to its brief calling attention to the major ones (pp. 17 to 24, below).

The scene of the accident was one of the four main freight and passenger tracks of respondent's line from New York to Washington in the vicinity of the 67th Street bridge in Philadelphia (Exhibits D-1 and D-2, 288a, 289a). Northbound passenger and freight trains operate at speeds varying from 30 to 75 miles per hour on the first two tracks on the south side of the right of way (30a, 47a, 183a). Southbound passenger and freight trains operate on the third and fourth tracks at speeds varying from 45 to 75 miles per hour (50a, 52a). From 160 to 200 trains daily move in both directions on these tracks (77a, 191a, 193a).

Bridges for pedestrians and vehicles cross the tracks overhead at 72nd, 71st, 70th, 67th, 65th, 63rd and 62nd Streets, and a footbridge crosses at 66th Street (95a, 105a, 223a), which are marked with warning signs which say, "Danger, live wire, keep off" (95a, 105a). Train movements in this area are controlled by the signal tower operator at Brill Tower in the vicinity of 61st Street (190a). Occasionally, because of train movements to the north of Brill Tower, trains on the second track are stopped temporarily at the signal bridge near 62nd Street. There is no way that the Brill signal tower operator can determine in advance when such delays might occur (73a), or how far a train stopped at 62nd Street might extend south of the signal bridge (64a, 82a, 83a-84a, 209a); nor does he know how long it will stop. On the day of the accident, the freight train with 61 cars was stopped at this signal for forty-four minutes because of train movements ahead (61a, 62a, 64a, 65a).

The minor petitioner and his younger brother climbed through a hole in a high cyclone fence erected and maintained by the Philadelphia Electric Company,[3] and entered land also owned by the electric company which adjoined

3. Petitioners' suit against the Philadelphia Electric Company for the same injuries, which had been consolidated for trial with the instant case, was continued on petitioners' motion (7a, 8a), and is still pending in the Philadelphia Common Pleas Court.

the railroad right of way (24a, 18a, 19a, 130a-131a). He had been warned by his parents not to go near the railroad tracks, knew that he should not have been there, and knew also that it was safer to cross the tracks by way of a nearby bridge (147a). A freight train was standing on the second track, but the boys could not see either end of it (132a). Train records offered in evidence by petitioners showed that during the time the boys were on the embankment adjoining the railroad tracks, seven freight and passenger trains moved northbound and southbound on the outside tracks, flanking the standing train (79a, 80a).

The minor petitioner crossed over the first track and climbed the side ladder of one of the box cars in the standing train (133a). Standing on top of the box car he pointed to an overhead catenary wire and warned his brother not to touch the wire or to fool around with it (133a, 148a). In doing so he was burned by electricity from the wire.

There were no witnesses to the accident, except the two boys. The accident was not reported to the railroad company by the city police (121a) and respondent first learned of it from a newspaper article the next day (166a).

Plaintiffs' two neighborhood witnesses testified that children frequently played on the embankment in the vicinity of the 67th Street bridge (90a, 102a), and that they had only occasionally seen children on top of cars at about that point (92a, 108a). Both of these witnesses had confirmed the truth of signed statements in which they said they had never seen this occur (99a, 107a). Sergeant Hammond of the railroad police, who was called by petitioners as a witness, had never seen children on cars in the vicinity of the 67th Street bridge (126a), although he knew of two other cases on other parts of the railroad where he had caught children on top of the cars (114a, 115a, 124a).

A retired engineman testified for petitioners that he had seen children playing on the embankment around 67th Street (173a). "Sometimes" he saw children go over the

top of trains at 67th Street (174a). He saw them climbing over cars all along the right of way from 49th to 72nd Street in Philadelphia, and "most any place" along his entire run from New York to Washington (185a, 186a, 188a).

All of the foregoing facts were developed by petitioners' own witnesses.

The principal of a nearby school and two veteran city police officers who constantly patrolled this district during the years preceding the accident, all testified for respondent that they had never seen children playing in the vicinity of the 67th Street bridge or climbing on cars around there (211a, 217a, 224a). An engineman on the New York to Washington run since 1942 (258a), testified for respondent that he never saw children on cars in the 67th Street area, although he occasionally saw them on the embankment (262a), and had seen them around 49th Street and occasionally north of Frankford Hill in Philadelphia (262a-263a).

After verdicts in favor of petitioners and the denial of its motion for judgment notwithstanding the verdict, respondent appealed to the Supreme Court of Pennsylvania. That court reversed the judgment in favor of petitioners and entered judgment in favor of respondent (Petitioners' Appendix, 23a). In doing so, the court below followed a long line of Pennsylvania cases applying the principles of Section 339 of the Restatement of Torts and held that the protective measures suggested by petitioners for the prevention of trespassing by children would inordinately burden the operation of the railroad and had therefore been rejected in the earlier Pennsylvania cases (Opinion, Petitioners' Appendix, 18a, 21a, 22a).

Petitioners filed a petition for reargument in the court below, contending that the court had decided a question of public policy and had failed to decide the issue of whether the burdensomeness of the suggested protective measures outweighed the risk to trespassing children, and that the

alleged failure of the court to decide this issue had deprived petitioners of their right to trial by jury in violation of the 7th and 14th Amendments to the United States Constitution (Petitioners' Appendix, 47a, 48a). The court below denied the petition for reargument without opinion (Petitioners' Appendix, 61a).

Subsequently, petitioners filed this petition for a writ of certiorari raising a different constitutional issue, asserting that the judgment of the court below was based upon an assumption of facts which were not in the record and upon which petitioners were given no opportunity to introduce evidence or present argument, thereby depriving them of due process of law in violation of the Fourteenth Amendment to the United States Constitution (Petition, p. 2).

STATEMENT OF RESPONDENT'S POSITION.

The petition for a writ of certiorari should be denied for the following reasons:

1. The case should not be considered upon certiorari because the question raised in the petition was not presented to the court below. Moreover, no federal question was alleged to exist at any stage of the proceedings below until an adverse decision had been rendered upon grounds which could have been anticipated. Thereafter a petition for reargument was filed, but in it was raised a question different from the one alleged in the petition for certiorari.

2. The case involves solely a question of Pennsylvania negligence law and therefore does not merit review upon certiorari.

ARGUMENT.

I. The Constitutional Question Which Petitioners Attempt to Raise Here Was Not Presented to the Court Below and Should Therefore Not Be Considered.

Assuming for the purpose of argument that the question which petitioners attempt to raise in their petition for certiorari is a constitutional question at all,[4] the petition should be denied because it states a question which was not presented to the court below. This court has uniformly denied its jurisdiction to consider federal questions raised for the first time here and not presented to the court below.

Petitioners raised no constitutional question at any stage of the proceedings until after the adverse decision of the Supreme Court of Pennsylvania, when they first suggested that there were "constitutional law questions inescapably created by the opinion [of the court below]" (Petition for Reargument, Petitioners' Appendix, 49a) and filed a petition for reargument urging their consideration. Generally, a constitutional question raised for the first time in a petition for reargument and not decided by the state court comes too late for review by this court. *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932); *Wall v. Chesapeake & Ohio Ry.,* 256 U. S. 125 (1921); *Godchaux Co. v. Estopinal,* 251 U. S. 179 (1919). Especially is this true, where, as here, the adverse decision should have been anticipated. *Herndon v. Georgia,* 295 U. S. 441 (1935).[5] Since the decision of the court below was based

4. This assumption is quite unwarranted, for the only question involved in the decision below is one of Pennsylvania negligence law, as more fully discussed below, pp. 11 to 15.

5. There, this court refused to consider the constitutional argument raised first in a petition for rehearing in the Supreme Court of Georgia, since no federal question was seasonably raised in the court below. This court found that the statute in question had in an earlier case been construed in substance in the same manner as in the

on and followed a number of earlier similar decisions holding that plaintiffs had presented insufficient evidence to sustain their verdicts under Section 339 of the Restatement of Torts because the measures suggested for the protection of trespassing children were inordinately burdensome (Opinion, Petitioners' Appendix, 21a-23a), petitioners were bound to anticipate the entry of judgment against them on the basis of a similar interpretation of Section 339. And if such a decision were fraught with constitutional problems, as petitioners now claim, they were bound to raise them at the first argument in the Pennsylvania Supreme Court.

Even assuming, however, that the petition for reargument was not too late to raise a federal question, this still does not avail petitioners, for the question which they now raise by petition for certiorari is a new and different one from that which they presented in their petition for reargument in the Supreme Court of Pennsylvania.

The imagined constitutional issue set forth in their petition for reargument was that they were denied the right to trial by jury afforded them by the 7th and 14th Amendments to the United States Constitution because the Supreme Court of Pennsylvania decided the case as a question of state public policy, instead of determining the question whether the burdensomeness of the suggested protective measures outweighed the risk to trespassing children (Paragraphs 8 and 9, Petition for Reargument, Petitioners' Appendix, 47a, 48a). Petitioners took a single sentence out of context in the court's opinion—just as they did with a different fragment in the petition for certiorari

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instant case, and that the defendant "was therefore bound to anticipate the probability of a similar ruling in his own case". *Id.* at pp. 445, 446. *Herndon* is frequently cited in per curiam decisions dismissing for want of jurisdiction. See, for example, *Southwestern Bell Telephone Co. v. Lee,* 311 U. S. 609 (1940); *Saenger Realty Corp. v. Grosjean,* 310 U. S. 613 (1940); *W. T. Carter & Bros. v. Short,* 308 U. S. 513 (1939); *Coleman v. City of Griffin,* 302 U. S. 636 (1937).

(Petition, p. 4)—and argued that *this* was the sole reason for the court's decision. Deciding this "alien" issue, as they described it (Petition for Reargument, Petitioners' Appendix, 47a), was claimed to have deprived petitioners of their right to trial by jury under the 7th and 14th Amendments to the United States Constitution as well as under Article I, Section 6 of the Constitution of Pennsylvania.

The petition for reargument had no sound basis to sustain it and the Supreme Court of Pennsylvania denied it. Petitioners' basic premise, that the court failed to decide the correct issue, was demonstrably false because that issue was squarely decided, and decided in line with the established Pennsylvania precedents (Opinion, Petitioners' Appendix, 21a-23a). Furthermore, the 7th Amendment is completely irrelevant to state judicial proceedings, for it is a guarantee only against *federal* judicial encroachment. In addition, Pennsylvania herself had long ago decided that the entry of judgment for defendant by the Supreme Court, notwithstanding a verdict for the plaintiff, under the statutory procedure that was followed here, is not a denial of plaintiff's right to a jury trial under her own Constitution. *Nugent v. Phila. Traction Co.*, 183 Pa. 142, 38 Atl. 587 (1897); see also *Smith v. Times Publishing Co.*, 178 Pa. 481, 36 Atl. 296 (1897). Finally, the United States Constitution does not guarantee the right to a jury trial of a civil action in a state court. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211, 217 (1916).

Having failed to persuade the Supreme Court of Pennsylvania that there were any constitutional questions which required further argument, let alone reversal, petitioners conceived a new and different federal question for this court, namely, whether they were deprived of due process under the 14th Amendment in being prevented from arguing and offering evidence on the sole "dispositive issue" in the court's opinion which, they said, was an unwarranted assumption of facts not in the record (Petition, pp. 11, 12).

To create this new constitutional question they plucked a fragment of a sentence out of the opinion different from that which was relied on in the petition for reargument and now insist that *it* was the sole basis on which the court below decided the case: that it was too burdensome to require the railroad to fence and patrol 275 miles of track (Petition, p. 4). Since petitioners now claim that this was the only reason for the court's decision, they argue that they should be given leave in a new trial to present evidence showing that conditions are not the same on all 275 miles of electrified track in Philadelphia residential areas as they are along the main line tracks where this accident occurred.[6] But this new so-called federal question was never presented to the court below. It comes too late to be raised now in the petition for certiorari. *Wilson v. Cook*, 327 U. S. 474, 483 (1946); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940); *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317 (1937); cf. *New York ex rel. Rosevale Realty Co. v. Kleinert*, 268 U. S. 646, 650 (1925).

New York ex rel. Cohn v. Graves, supra, illustrates the attitude of this court toward the untimely raising of even a valid federal question. There petitioner had challenged in the state courts a state income tax on the basis that it violated due process when applied to income from out-of-state lands. On review in this court it was also urged that the tax violated due process in that it was retroactively applied. This court sustained the tax against the first attack and refused to consider the second, saying (300 U. S. at p. 317):

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising

6. The fallacy of this argument is dealt with more particularly below, pp. 13 to 14.

under a different or the same clause in the Constitution with respect to which other questions are properly presented."

Since the so-called constitutional question which petitioners raise here is a new and different one from that which they argued belatedly in their petition for reargument in the court below, the question should not be considered upon writ of certiorari in this court.

II. This Case Does Not Merit Review Upon Certiorari.

Review by this court on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor, as, for example, where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. (Rule 19, Revised Rules of the Supreme Court of the United States.) This case does not merit review upon certiorari because there is no substantial federal question involved. The case is concerned solely with a question of Pennsylvania negligence law—and not even a novel question of Pennsylvania law at that.

The only question decided by the Supreme Court of Pennsylvania was whether under its own earlier interpretations of Section 339 of the Restatement of Torts petitioners sustained their burden of proving that respondent was negligent. As the court below succinctly stated:

> "The issue here is whether the evidence presented by the plaintiffs at the trial brings the case within § 339. We think it does not" (Opinion, Petitioners' Appendix, 16a).

Upon analyzing the evidence in the record the court below concluded that petitioners had failed to sustain this burden, and therefore entered judgment for respondent notwithstanding the verdict under the established Pennsylvania

statutory procedure empowering the Supreme Court of Pennsylvania to make such a review of the evidence and to enter such a judgment. Act of May 20, 1891, P. L. 101, Section 2, 12 P. S. 1164.[7]

In reaching this conclusion the court below reviewed all of its prior decisions in which recovery had been allowed under Section 339 of the Restatement, where it had stressed the necessity of proving that the danger to trespassing children could be eliminated by moderate expense and effort on the part of the defendant (Opinion, Petitioners' Appendix, 18a). It found that the protective measures advocated by petitioners in this case would be inordinately burdensome in comparison with the risk to trespassing children and were therefore not required of respondent in order to meet the standard of care laid down in other Pennsylvania cases (Opinion, Petitioners' Appendix, 21a, 23a).

Arguments similar to those of petitioners had been advanced in earlier cases only to be found untenable by the Supreme Court of Pennsylvania. It had long before been settled in Pennsylvania that there is no obligation on the part of a railroad company to fence its right of way to prevent trespassing by children. *Malischewski v. Pennsylvania Railroad Co.*, 356 Pa. 554, 52 A. 2d 215 (1947) (Opinion, Petitioners' Appendix, 20a).[8] Petitioners' other ar-

7. The recognized procedure for entering judgment as a matter of law in favor of one of the parties upon the court's analysis of the evidence involves no violation of constitutional rights, whether this be done by directed verdict in the trial court, *Wagner Electrical Mfg. Co. v. Lyndon*, 262 U. S. 226 (1923) (a state court); or by the entry of judgment notwithstanding the verdict in the appellate court, *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654 (1935) (a federal court acting in conformity with statutory state procedure).

8. The trial court, whose judgment petitioners would now have reinstated, also recognized that this is the law in Pennsylvania. That court said in its opinion: "As concerns the onus of protecting children, we agree that there is no duty to fence in the railroad right of way. The jury was so charged . . . Fences are not necessary" (Petitioners' Appendix, 9a).

guments, that lookouts and guards should be posted, or crews or police detailed to patrol the tracks and the standing train, had likewise been rejected in earlier decisions. *Scibelli v. Pennsylvania Railroad Co.*, 379 Pa. 282, 108 A. 2d 348 (1954); *Shaw v. Pennsylvania Railroad Co.*, 374 Pa. 8, 96 A. 2d 923 (1953) (Opinion, Petitioners' Appendix, 22a-23a). The court stated:

> "The protective measures suggested by the plaintiffs, if adopted, would inordinately burden the operation of the railroad, and consequently have been rejected by this court in the past." (Opinion, Petitioners' Appendix, 21a).

In accordance with these precedents the court below concluded that "to allow recovery under Section 339(d) of the Restatement in the instant case would extend that rule far beyond its reasonable and intended limits" (Opinion, Petitioners' Appendix, 23a).

Petitioners' whole constitutional argument rests upon a false premise. They have done in this court just what they did in the court below. They have taken a fragmentary sentence out of context in the court's opinion (Petition, p. 4), labeled it as the sole "dispositive issue", and claimed that they were denied a hearing and the right to present evidence upon this sole "dispositive issue."[9] Petitioners have truncated the court's opinion to a "holding that the entire 275 miles of track within the Philadelphia area must be fenced or patrolled in order to sustain plaintiff's recovery . . ." (Petition, p. 4). This is not true, as a reading of the court's opinion clearly demonstrates.

The court below did not rule, as petitioners argue, that the cost of fencing and patrolling 275 miles of track was the element of burdensomeness which defeated petitioners'

9. That the fragmentary sentence upon which petitioners base their whole argument was intended merely as an illustration of the manner in which the measures advocated by petitioners here might be extended in future cases is obvious when it is read in context (Opinion, Petitioners' Appendix, 21a).

claim, but rather that petitioners' own evidence showed that the hazard of trespassing by children along this very right of way could not be eliminated by reasonable measures within Pennsylvania's interpretation of the requirements of Section 339 of the Restatement.

Petitioners simply ignore the significant portion of the Supreme Court's opinion in which their evidence is analyzed. The following passage *precedes* the reference to 275 miles of electrified track:

> "In addition it should be noted that on the north side of the tracks between 67th Street and 66th Street, practically the entire block gave easy access to the railroad and of course this would also have to be fenced to prevent children from playing in the area. Moreover the plaintiffs' evidence in the instant case amply shows not only that children played at the base of the 67th Street bridge, but also that they played in many other areas along this right of way. One of plaintiffs' witnesses, a Mr. Brower, who was a former locomotive engineer for the Pennsylvania Railroad, testified that he had often seen children playing beside the right of way and on the railroad cars all along his entire run which was from New York to Washington and return, and in the Philadelphia area he specifically mentioned 39th, 49th, 50th, 59th, 67th, 71st and 72nd Streets in Philadelphia." (Opinion, Petitioners' Appendix, 20a.)

Thus, it was petitioners themselves who introduced the crucial evidence on the burdensomeness of the precautions that would have been required of respondent in order to eliminate the dangers to children who trespassed upon those main line tracks. Far from being denied a fair hearing upon an issue which had not been litigated (Petition, p. 14), petitioners themselves created the issue and produced all of the evidence on which it was decided.[10]

10. It was one of petitioners' own witnesses who on cross-examination referred to the 275 miles of electrified main tracks in the Philadelphia area (157a).

The power of review upon certiorari will not be exercised in cases which, as here, turn upon the sufficiency of the evidence to support a factual conclusion, *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508 (1924), writ dismissed after hearing; nor to review cases involving the sufficiency of the evidence to sustain a claim arising under state law, *Houston Oil Co. of Texas v. Goodrich*, 245 U. S. 440 (1918), writ dismissed as improvidently granted.

Far from being a question of "substantial and of public importance" which "is recurrent on the exercise of appellate jurisdiction by the State Courts" (Petition, p. 20), this case involves only a question of Pennsylvania negligence law, which was not a new one and was decided correctly and in accordance with the Pennsylvania precedents. There is nothing to justify review upon certiorari.

III. Conclusion.

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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APPENDIX TO BRIEF FOR RESPONDENT.

This appendix has been prepared in order to call attention to the major misstatements of the evidence contained in the petition for writ of certiorari similar to those which prompted the Supreme Court of Pennsylvania to remark in its opinion at footnote 4:

> "Our consideration of the case has been made difficult because in his zeal the brief of plaintiffs' counsel contains misstatements of fact and unwarranted assumptions." (Opinion, Petitioners' Appendix, 17a, Footnote 4)

The pages referred to in boldface type below are those of the petition where the misstatements may be found.

Page 5: "'the jungle' . . . where freight cars were habitually stopped at a regular signal post for long periods of time . . ."

There was no evidence of the length of time that any train had stopped at this point, except the train involved in this accident on the day the accident occurred, since petitioners' witness, Brower, left freight service in 1941 (183a). There was no evidence that any train stopped by the signal, which was not at 67th Street but at 62nd Street, extended to the area of 67th Street, except the train involved in this accident. For a train to have done so it would have had to be more than 50 cars in length, and by far the largest number of trains that were stopped at 62nd Street had many fewer cars than that (209a). There was evidence that trains had been seen standing on one or more of the tracks in the 67th Street area (92a, 99a, 100a, 104a, 174a, 183a); but what track they were on, how long they had been there, whether northbound or southbound, and whether stopped by the signal at 62nd Street, was not disclosed.

Page 5: "'the jungle' . . . where at least four other similar serious accidents to children had occurred in the same way and were known to the defendant. . . ."

There was no evidence of this. The Supreme Court of Pennsylvania remarked on the impropriety of this so-called evidence:

> "For the same purpose, plaintiffs' counsel in an attempt to impeach his own witness, (without any plea of surprise and over counsel's objections) referred to four prior electrical accidents occurring at 49th Street, 54th Street, 65th Street, and between 66th and 67th Streets." (Opinion, Petitioners' Appendix, 20a, Footnote 5)

As to these accidents, which occurred one in 1945, two in 1947 and one in 1948 (121a, 123a), there was no evidence to show their circumstances, the injuries suffered, or any similarity between them and the present accident.

Page 5: "'the jungle' . . . where the stopped car was manned by brakemen who could easily have left their seats and guarded the scene but a few feet away. . . ."

There was no evidence that any members of the train crew were on any car of the 61 car train at or near the vicinity of the accident, and anywhere other than on the engine and cabin car, at opposite ends of the train, which were out of sight of the petitioner (132a).

Page 5: "'the jungle' . . . where the control tower which knew in advance when trains would so stop could have been notified to direct mobile railroad police to the scene of a stopped car. . . ."

There was no evidence that the tower operator knew in advance that any train might be stopped at the 62nd Street signal, that he knew of the probable duration of any such stop or that if a train were stopped, he knew how far it would extend back toward 67th Street (73a, 64a, 82a, 83a-84a, 209a). The only testimony on this subject was the

statement of the tower operator, who was called as a witness by petitioners, that he could not look forward to a delay of long trains because it would depend on conditions as they arose (73a).

The mobile police car was used by Sergeant Hammond, who testified as a witness for petitioners, to patrol his entire district, which extended from Vine Street in Philadelphia to West Chester, Pennsylvania, and included all piers on Delaware Avenue and all yards from Philadelphia to West Chester (114a). There was no evidence of how long it would have taken Sergeant Hammond, if otherwise employed throughout his large district, to get to 67th Street or any other particular portion of the railroad.

Page 6: "He climbed on top of a box car which had been halted for more than an hour and a half."

The box car was part of a 61 car train which was stopped temporarily at a signal at 62nd Street for a total of 44 minutes because of other train movements ahead (61a, 62a, 64a, 65a). How many of the 44 minutes had passed before the accident was not accurately stated (132a).

Page 7: "The record discloses that Sergeant Elijah L. Hammond, police sergeant for the railroad company, and one of its witnesses, admitted that he knew of the cases of four other boys who had been injured at that very place and in the identical manner."

Sergeant Hammond testified as a witness for petitioners, not respondent (113a). A similar misstatement of Sergeant Hammond's testimony appears at page 5 of the petition, and has already been referred to above, page 18.

Pages 7-8: "In referring to the area in question he further testified at 124a:

'A. Well, I haven't the record here, but I have taken numerous boys home and notified their parents about playing on this right of way in that particular vicinity. I have warned their parents. Where they were over

nine years of age I hauled them into the station house. Otherwise, I take them home and warn their parents about these children gathering there."

There was no evidence that Sergeant Hammond ever took boys off the right of way in "the area in question." The last area mentioned before the witness referred to boys "in that particular vicinity" (124a) was 49th Street, and immediately before that, 54th Street (123a).

Page 8: "There was testimony that children habitually played on top of box cars which were left standing on the tracks at that point [67th Street] (132a)."

There was no evidence that box cars were left standing at that point. There were four through tracks, and the only cars that were ever "standing" there were in trains temporarily stopped for a signal. One of petitioners' witnesses testified that he had seen children on cars "perhaps fifteen times" in ten years (92a, 93a). Another witness had seen them on cars "maybe fifteen times" in the five years that she had lived in the neighborhood (102a, 108a). The only other witness who testified for petitioners on this subject was not present at the scene of the accident "habitually" at the time it occurred, but passed the point only after sunset and before sunrise (178a) when he made the run. When he was on the extra list in freight service, and working only when some regular employee was unavailable, he saw children "in the 67th Street area" every day that "he was down there" "in the summertime", which was in 1941 and before (185a). The page citation given by petitioners, 132a, indicates that children never "played on top of box cars."

Page 8: "A retired railroad engineer who had been employed by the railroad company for 47 years testified that the railroad company had by specific written order required the engineers to give a warning signal at 67th Street in order to protect against this very danger, i.e., children playing on or about standing box cars."

The only evidence about warning whistles came from petitioners' witness Brower and, as the Supreme Court of Pennsylvania noted:

> "His testimony as to the issuance of such instructions was contradicted by plaintiff's own witness, George Bottomley, a rules examiner of the railroad, and also by overwhelming testimony adduced by the defendant." (Opinion, Petitioners' Appendix, 20a, Footnote 5.)

Actually Brower testified only that he had to keep blowing the warning whistle at 67th Street *if* he saw children there (174a). However, the same witness indicated that there was nothing peculiar about 67th Street because he had seen children all along the right of way from 49th Street to 67th Street (185a), at 71st and 72nd Streets, at the Paschall Freight House, and at 50th Street (186a), at 49th Street, 59th Street, and 67th Street, and around North Philadelphia (187a), and practically any place along the line between New York and Washington that the witness traveled (188a).

Page 8: "A Philadelphia police officer . . . testified that there was a well-defined pathway doubtless made by citizens over many years who used this short-cut to cross the tracks at this very point (225a)."

The path referred to was a path which ran, not across the tracks, but parallel to the tracks directly behind the garages of properties bordering on the north side of the right of way between 67th and 66th Streets, and extended to 63rd Street (93a, 95a-96a, 97a, 145a, 146a).

The same Philadelphia police officer, who regularly patrolled the area around 67th Street, testified that he had never seen children playing on or near the tracks in the vicinity of the 67th Street bridge or climbing on cars around there (223a, 224a).

Page 9: ". . . a railroad yard in the congested heart of the city, a yard just like Coney Island with sluices, slides, shrubs, a series of tracks where box cars were regularly halted for long periods of time by a fixed signal post . . ."

There was no railroad yard in the vicinity. The scene of the accident was the four main line tracks running between New York and Washington where from 160 to 200 trains daily move in both directions at speeds varying from 45 to 75 miles per hour (50a, 52a, 77a, 191a, 193a). There was no evidence that box cars were regularly halted for long periods of time by a fixed signal post. A similar misstatement at page 5 of the petition has been referred to above at page 17.

Page 9: "An area where children notoriously and openly played on all the appurtenances and structures as well as the box cars . . ."

This is not so. A similar misstatement at page 8 of the petition has been referred to above at page 20.

Page 9: "The court also ignored the evidence of *other* safety measures which the railroad could have taken without *any* additional cost whatsoever. It is undisputed that there were flagmen on this freight train which was temporarily halted, who were already on duty and were being paid anyway." (Petitioners' emphasis.)

There was no evidence that there was more than one flagman on this train, or that the flagman was in any position whatever to patrol the entire length of the train where trespassing might occur.

Page 10: "Obviously the railroad in advance of this accident recognized its duty to patrol such cars in vicinities such as this. The orders to do so were outstanding. The flagman here negligently ignored that order."

There was no evidence that there were any orders requiring the flagman to patrol the train in this or any other vicinity or that the flagman ignored such orders.

Page 10: "There would have been no cost to the railroad if it had required these employees to take elementary precautions to watch out for children at this particular narrow, isolated danger spot."

Petitioners' own evidence showed that trespassing children were not peculiar to "this particular narrow, isolated danger spot" at 67th Street. Petitioners' witness Brower testified that he had seen children all along the right of way from 49th Street to 67th Street (185a), at 71st and 72nd Streets, at the Paschall Freight House and at 50th Street (186a), at 49th Street, 59th Street, 67th Street and around North Philadelphia (187a), and practically any place along the line between New York and Washington that the witness traveled (188a).

Page 10: "Upon deciding to delay this train the tower operator could easily have notified the railroad's local mobile private police to patrol the area (83a), when he knew that the freight train was halted in 'the jungle'."

The tower operator does not "decide to delay" the train. Such unpredictable delays depend upon the condition of train movements ahead (73a).

There was no way that the Brill signal tower operator could determine in advance when such delays might occur (73a), or how far a train stopped at 62nd Street might extend south of the signal bridge (64a, 82a, 83a-84a, 209a). A similar misstatement at page 5 of the petition has been referred to above, pages 18-19.

Page 10: "Hammond, its mobile private detective, admitted that had he been notified that the train was stopping there, he would have and could have been there in just a few minutes."

There is no evidence to support this statement.

Page 10: "*As the tower operator knows in advance before the train stops there that it will do so, he could have had Hammond there even before the train came to a stop.* And this is at no expense at all." (Petitioners' emphasis.)

There is no evidence to support this statement. Similar misstatements at pages 5 and 10 of the petition have been referred to above, pages 18-19, 23.